Budrovich Contracting Co. and Budrovich Excavating Co. a Single Employer *and* Patrick P. Kammer. Case 14–CA–24969

August 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On April 14, 1999, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

1. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off Kammer and Busch for concertedly asserting their contract rights and insisting on being paid the rate for field work established in the collective-bargaining agreement between the Respondent and the Union. However, in his analysis of the violation, while properly citing *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), as the basis of his analysis, the judge failed to analyze the elements of the General Counsel's case before analyzing the Respondent's defense. Under *Wright Line,* the General Counsel must establish that protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Here, the judge found, and we agree, that "the motivating factor for Busch and Kammer's layoff was directly related to their engaging in protected activity and/or their involvement with the Union." In so establishing, the General Counsel showed that the Respondent "harbored a dislike and even disrespect for the Union." Robert (Bob) Abeln, the Respondent's shop foreman and, as stipulated, a supervisor and agent of the Respondent, spoke of "union troublemakers," and Vice President Jeffrey Budrovich made disparaging remarks about the union contract and directed employees to disregard union contract rules.[2] Next, the General Counsel established that the Respondent was clearly aware that Kammer and Busch were asserting their rights under the union contract. Finally, the General Counsel established that the timing of the layoff was proximate to Kammer's and Busch's assertion of their rights under the contract. Thus, the General Counsel established that the protected conduct was a motivating factor in the Respondent's decision to lay off Kammer and Busch.

The judge also properly rejected the Respondent's defenses. The judge found that Budrovich's claim that the October layoffs were a result of inclement weather was belied by both the climatological records produced by the General Counsel which "showed very little precipitation on average in October and November 1997" and the credited testimony that mechanics were "used to working in bad weather." The judge also noted that the Respondent produced no documentation to support its claim that the layoffs occurred because the Respondent "suffered a loss of significant business through unsuccessful bids." In fact, the judge found that the only evidence of unsuccessful bids was "Budrovich's naked self-serving testimony." Nor did the judge believe the Respondent's assertion that "there was little or no mechanic's work for the two." Instead, the judge credited the testimony of various witnesses that during the layoffs of Busch and Kammer laborers and a Budrovich family friend were seen performing work that the two laid-off mechanics were qualified to perform and had performed before their layoffs. The judge also found, contrary to the Respondent's assertion, that a third mechanic, Ronald Baisch, was not laid off along with Busch and Kammer.

The Respondent contended that other employees were laid off in October 1997. The judge rejected the contention and the Respondent excepts. It argues that it produced business records establishing that more than 30 of its operators were laid off during the last few weeks of October. While many of these records establish that some operators did not report to work for some days during October, none of them establish why the operators were out of work or that they were, in fact, laid off and not on vacation, sick leave or annual leave. Moreover, if

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with the judge's finding that the Respondent fired employees Patrick Kammer and William Busch, and in rejecting the Respondent's contention that they quit, Member Brame notes the comments of the Respondent's vice president, Jeff Budrovich, set out at fn. 40 of the judge's decision.

Further, in agreeing with the judge that the Respondent by Jeff Budrovich unlawfully interrogated employee Michael Lillicrap in March 1998, Member Brame has viewed the incident in the "totality of the circumstances," as delineated by the circuit court decisions noted by the judge at fn. 51 of his decision, and as described by the judge's findings. He therefore puts no reliance on the judge's comments that Board precedent applies a per se approach. Nor does he rely on the judge's comments regarding the actions of Respondent's shop foreman, Bob Abeln, since the violation found ultimately involves the actions of Jeff Budrovich.

[2] In agreeing with his colleagues that the Respondent displayed union animus, Member Brame relies only on the various 8(a)(1) violations that the judge found.

in fact these operators were laid off, that does not impact on our decision. The issue is whether any other *mechanics* were laid off during the time period in question and the credited evidence established that the only *mechanics* laid off were Kammer and Busch.

2. We also agree with the judge that the Respondent violated Section 8(a)(1) of the Act when it revoked the mechanics' no-call-in policy for Kammer and Busch. However, because the allegation involves discrimination in terms and conditions of employment in retaliation for engaging in protected concerted activity, we do not agree with the judge's conclusion that "motivation is not an essential element" of the violation. In fact, motivation is an essential element, and the allegation should have been analyzed under *Wright Line*, supra. In applying *Wright Line,* we find, for the reasons enumerated by the judge, that the protected concerted activity of Kammer and Busch was a motivating factor in the Respondent's decision to revoke the no-call-in policy for those two employees. We find further, also for the reasons stated by the judge, that the Respondent has not shown that it would have revoked the policy had Kammer and Busch not sought the Respondent's compliance with the field pay provision of the collective-bargaining agreement.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Budrovich Contracting Co. and Budrovich Excavating Co., a single employer, St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Patricia B. Givens, Esq., for the General Counsel.

Andrew J. Martone, Esq. (Bobroff, Hesse, Lindmark & Martone, P.C.), of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard before me in St. Louis, Missouri, on July 15–16, 1998, pursuant to charges originally filed on February 3, 1998, and amended on April 27, 29, and June 25, 1998, against Budrovich Contracting Co. and Budrovich Excavating Co. as a single employer (the Respondent).[1] On April 29, 1998, the Regional Director for Region 14 of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by interfering with certain employees' assertion and exercise of rights guaranteed by the Act and discriminatorily laying off and ultimately discharging two of its employees, William Busch and Charging Party Patrick Kammer. On June 29, 1998, the Regional Director for Region 14 amended the complaint. The Respondent, on or about May 13, June 8, and July 10, 1998, timely filed a responsive answer denying the commission of any unfair labor practices and asserting several affirmative defenses to the charges in the original and amended complaints. The decision herein reflects only those charges remaining after final amendment.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Business of the Respondent

Through its two affiliated business enterprises, both Missouri corporations, the Respondent, with offices and facilities located in St. Louis, Missouri, is engaged in heavy equipment rental (Budrovich Contracting Co.) and construction-related excavation (Budrovich Excavating Co.). During the 12-month period ending March 31, 1998, through its business enterprises, the Respondent performed services valued in excess of $100,000 in States other than Missouri. At all material times, the Respondent's business enterprises have been affiliated business enterprises with common officers, ownership, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as single-integrated business enterprises and thereby constitute a single-integrated business enterprise and a single employer within the meaning of the Act. The Respondent admits, and I find, that it is a (single) employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that at all material times, Local 513, International Union of Operating Engineers, AFL–CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent was founded by Sam Budrovich in 1946 and is currently managed and operated by his grandson, Jeffrey (Jeff) Budrovich, who serves as vice president.[2] The Respondent's operations are situated on family homestead property on which the family still maintains a residence. The Respondent is located 10 to 15 miles south of St. Louis, Missouri, and provides construction-related services within a 150–200 mile radius of its operations and facilities. The Respondent's facilities consist of a separate office building, an adjacent maintenance shop with several large service bays, and a large lot—dubbed the "yard"—for the storage of equipment.

The Respondent's primary business involves leasing large, heavy construction equipment (and operators to man them) such as cranes, bulldozers, backhoes, high lifts, and dump trucks to construction contractors; the Respondent also performs excavation work such as sewer, and similar projects. The Company maintains over 100 pieces of heavy equipment as well as various support vehicles, pickup trucks, and trailers, used to transport machinery to jobsites. At all material times, the Respondent was also indirectly involved in the construction of an industrial park known as the quarry or landfill.[3] The Respondent's business is somewhat seasonal with the busiest times being spring, summer, and fall; winter is often a slow time in the construction business and the Respondent's sales were historically affected by this phenomenon of the trade.[4] However, the Respondent has never laid off mechanics during the winter months for lack of mechanical work or business.

[1] The parties stipulated and agreed at the hearing that Budrovich Contracting Co. and Budrovich Excavating Co. are a single employer under the Act. Based on the evidence adduced at the hearing, the Budrovich companies clearly meet the criteria for treatment as a single employer as established under the criteria enunciated in *Radio Union v. Broadcast Service*, 380 U.S. 255 (1965) (per curiam); and I would so find.

[2] Sam Burdrovich does not figure in this dispute. Accordingly, all references herein to Budrovich relate to the grandson, Jeffrey, unless otherwise indicated. The parties stipulated and agreed that Jeffrey Budrovich was a supervisor under Sec. 2(11) of the Act.

[3] The Budrovich family purchased the landfill or quarry property in 1991 or 1992 as an investment apart from the Company. The Respondent has no economic interest in this property. However, the Respondent's equipment and employees are used from time to time on the project.

[4] The winter months are generally understood to include December 21 thorough March 21 of any given year.

The Respondent's nonclerical employees normally consist of around 60–70 operators, oilers, mechanics, and yard laborers; all are members of the Union except for the yard laborers.

Jeff Budrovich is primarily responsible for operating the business; he maintains control of the equipment, bids on projects, schedules all work, and handles payroll and accounting duties with some clerical assistance. Budrovich is responsible for all personnel matters, including hiring and firing for the Company. Robert (Bob) Abeln, hired on November 1, 1995, acts as the Respondent's shop foreman and supervises the mechanics and yard laborers but sometimes functions as a mechanic and operator for the Company.5 Abeln is also a member of the Union.

The Respondent is signatory to a collective-bargaining agreement (the contract) between the Union and the Associated General Contractors of St. Louis (AGC).6 The contract, in pertinent part, provides that mechanics who work outside the shop—in the field—are entitled to an additional $1.30 per hour in compensation; the additional pay is commonly designated field pay. The contract also recognizes two types of mechanics—"B" cardholders and those holding "C" cards. B cardholders may operate equipment in the field;7 "C" cardholders are not permitted to operate machines in the field except as part of the repair, maintenance, or testing of the machines. The contract also provides for the filing of grievances, and binding arbitration of disputes arises thereunder between the Union and signatory contractors. Apart from the contract, union members may file charges against fellow members for infractions of union rules.

Historically, the Respondent's mechanics performed the bulk of repair and maintenance of its equipment, although operators and drivers have performed what may be described as routine maintenance; e.g., oil and filter changes on their own equipment. Generally, the mechanics perform the more difficult and/or complex repairs on engines, transmissions and, the hydraulic cooling brake cylinders systems of the machinery. Mechanics generally install fittings and fenders, change teeth on crane or high lift buckets, install seals, lubricate crane booms, pack bearings, repair springs, and install shock absorbers among many repair service and maintenance functions. Mechanics also have substantial welding duties as part of their job.

Yard laborers historically have been employed as helpers to the mechanics and maintainers of the physical plant. Yard laborers have also performed certain customary but minor mechanic duties such as oil changes, battery replacements, replacement of shocks, and welding, but only when they were deemed competent to do the work and the regular mechanics were otherwise too busy to attend to those tasks.

Irrespective of their card status, mechanics were called on by the Respondent's management to operate machinery in the field from time to time and some of the Respondent's mechanics complied with these requests. Mechanics traditionally were not (as were the operators) required to call in the night prior to reporting for work to ascertain availability of work for the next day.

The Respondent's operators and mechanics complete daily timesheets setting out the hours worked and nature of work performed. The daily timesheet information is then transferred to weekly sheets for each employee with a designation as to whether the employee worked in the shop, office, yard, or in the field. The weekly timesheets are then used to generate the Respondent's payroll billing records. The Respondent's pay period is Wednesday through the following Tuesday weekly; payday is Friday.

The Respondent hired alleged discriminatee William Busch in September 1996; alleged discriminatee and Charging Party Pat Kammer was hired on about June 3, 1997. Both men were hired as mechanics and possessed union "C" cards.

During the times material to this matter, the Respondent employed two other mechanics, Ronald Baisch and the aforementioned Abeln, and two yard workers who assisted the mechanics, namely, Paul Rodgers and Kenny Eckhoff.

On October 2, 3, and 6, 1997, Busch worked at an offsite location and submitted timesheets indicating that he was entitled to field pay;8 his paycheck for October 9 should have reflected the additional pay to which he was entitled but did not. Moreover, Busch did not receive field pay on October 16, his next payday. Busch reported to the Respondent (Budrovich) that he had not received field pay.

On or about October 14, Union Business Agent John Saunders appointed Kammer as shop steward at the Respondent's facilities.

On October 20, Kammer worked at an offsite job (the quarry) and submitted a daily timesheet indicating that he was entitled to field pay.9 On October 21, the Respondent, through Abeln, advised Busch and Kammer that they both would be required to call in each night to see if there was mechanical work available for them the next workday. Pursuant to Abeln's instructions, Busch and Kammer checked in with him to ascertain the availability of work for the next day on the evenings of October 21, 22, and 23.

On October 22, the Respondent, through Abeln, requested both Busch and Kammer to submit another timesheet for their previously requested field pay; both mechanics complied with this and delivered their timesheets to Budrovich. Kammer again worked offsite on October 23 and submitted a timesheet requesting field pay.10 On October 23, the Respondent paid field pay to Busch for October 2, 3, and 6 and to Kammer for October 20. On or about October 26, Abeln advised Busch by telephone that there was no work for him and he was not to report for work until notified. On the morning of October 27, Kammer reported for work,11 but was told by Abeln that there was no work for him and to go home. Budrovich, who said the Respondent had no work for them, placed both men on indefinite layoff.12

On or about November 3, Kammer filed charges against Abeln with the Union, alleging that Abeln engaged in conduct unbecoming of a union member.13 Also, on November 3, Busch filed a grievance14 with the Union against the Respondent alleging violations of the contract regarding his layoff and the nonunion laborers' performing mechanic's work. After filing their respective charges on the same day, Kammer and Busch removed their tools from the Respondent's facilities; they were assisted in this by several of the Respondent's employees, yard laborers Kenny Eckhoff, Mike Lillicrap, and Douglas Kollmeyer.

Before and after the time of Kammer and Busch's layoff, the Respondent employed union member Ronald Baisch as a mechanic. Baisch was never put on on-call status and currently is employed by the Respondent. Sometime in late December 1997 or early January 1998, the Respondent hired Mark Fallert, a mechanic and a member of the Union. The Respondent has never recalled or offered to recall either Busch or Kammer.

B. The 8(a)(3) and (1) Allegations

The complaint alleges that the Respondent laid off and ultimately terminated mechanics Busch and Kammer on around October 26 and November 3, respectively, because of their union involvement and support, for engaging in concerted activities, and to discourage employees from engaging in these activities in violation of Section 8(a)(3) and (1) of the Act.

Applicable Legal Principles

In cases where employers are charged with violations of Section 8(a)(3)15 and (1)16 of the Act, the Board set forth its test of causation in the case of *Wright Line*, 251 NLRB 1083 (1980),

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[5] The parties stipulated and agreed that Abeln was a supervisor and agent of the Respondent within the meaning of Sec. 2(11) and (13) of the Act.

[6] The AGC contract is contained in GC Exh. 20. It is effective as of May 1, 1995, through May 1, 1999.

[7] Robert Abeln possessed a "B" card.

[8] Busch's timesheets for October 2, 3, and 6 are contained in GC Exhs. 6, 7, and 8, respectively.

[9] Kammer's timesheet for October 20 is contained in GC Exh. 3.

[10] See GC Exh. 5. Kammer was paid field pay for this day.

[11] Abeln attempted to call Kammer on October 26 at home also, but, probably due to a defective telephone answering machine, Kammer did not receive the message from Abeln.

[12] Busch and Kammer were never told they were "layed off"; they were simply told that there was no work for them. It should be noted that while the Respondent asserted at the hearing that Kammer was not regarded as a good mechanic—some of his work was not properly performed and had to be redone (so-called "comebacks")—and he talked excessively on the job, he was not laid off for these reasons. Likewise, as will be seen with Busch, neither his work nor attitude about work was problematic for the Respondent; in fact, management regarded him as a very good mechanic and employee.

[13] Kammer's charges are contained in R. Exh. 2

[14] R. Exh. 1. Busch submitted a handwritten version of the charge, which the Union later typed in final form.

[15] Sec. 8(a)(3) of the Act (29 U.S.C. §158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

[16] Sec. 8(a)(1) of the Act (29 U.S.C. §158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of the Act."

enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under this test, for determining, as here, whether an employer's layoff or discharge of an employee was motivated by hostility toward union membership or union activity, the General Counsel has the burden of persuasion, prima facie, that protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, then the burden of persuasion shifts to the employer to prove its affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity.[17] If the reasons advanced by the employer for its action are deemed pretextual, that is, if the reasons either did not exist or were not in fact relied upon, it follows that the employer has not met its burden and the inquiry logically ends. Where an employer asserts a specific reason for its action, then its defense is that of an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of protected conduct. Thus, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place. *Kellwood Co.,* 299 NLRB 1026, 1028 (1990).

It is well settled under Board precedent that the timing between the employer's action and known union activity can supply reliable and competent inherent evidence of unlawful motive for purposes of the *Wright Line* analysis. *Grand Rapids Press*, 325 NLRB 915 (1998); *Kinder-Care Learning Centers*, 299 NLRB 117 (1990); *Alson Knitting, Inc.,* 301 NLRB 758 (1991). Also, where an employer accelerates a discharge or layoff of an employee in close proximity to union activity, this, too, may supply evidence of unlawful motive. *IMAC Supply*, 305 NLRB 728, 736–737 (1992); *American Wire Products*, 313 NLRB 989 (1994).

C. The Layoff of Busch and Kammer and the Field Pay Issue

As a preliminary statement, in my view, it incontrovertible on this record that were it not for the raising of the issue of field pay, first by Busch and then by Kammer, that in all likelihood this case and controversy would not have arisen. Thus, it is useful and instructive to begin at the point of origin of this matter, that is, with Busch's submission of timesheets including field pay for October 2, 3, and 6 and his not receiving these amounts on his next paycheck on October 9.

Busch testified about his attempts to rectify this matter.

On about October 10, Busch talked to Kammer about not receiving his field pay and that he intended to speak with Budrovich. Busch received his next check on October 16 and noticed that there were no field pay payments for the prior dates.

According to Busch, he spoke to Budrovich on October 13 in his office about his not having received his field pay. Budrovich acknowledged this, but claimed not to know what field pay was. Busch explained that it was a contract-mandated differential of $1.30 per hour to be paid to mechanics who perform their work in the field. According to Busch, Budrovich's response was to note that was only about $10 per day. Busch retorted that he had been involved in strikes over as little as 50 cents and that his money was important to him. According to Busch, Budrovich said that he did not want to pay him any more than he does the other mechanics. Busch told Budrovich that he was not concerned about other mechanics. Moreover, he had worked in the field several prior times but did not charge field pay; however, his current requests were based on 3 straight days in the field. Finally, Busch told Budrovich that by the contract not being a "pick and choose" contract, he was entitled to the field pay. Budrovich indicated he would check with Abeln and get back with him. According to Busch, this conversation was a "little heated but there was no aggression towards anyone."

Busch spoke to Budrovich once more about field pay around 9 or 9:30 a.m. on October 21, alone in Budrovich's office. According to Busch, he asked Budrovich if he had made up his mind about the field pay and Budrovich replied that he would address the issue "real soon." Later that same day around 3:15 p.m., Busch met with Abeln and Kammer[18] at Abeln's request. According to Busch, Abeln said that he had talked to Budrovich and was instructed to tell them that mechanics were no longer to receive the special privilege of not having to call in and/or checking in every prior evening to determine whether work was available the next day. According to Busch, Abeln told him and Kammer that Budrovich was "mad" about what is going on. According to Busch, Abeln said he recognized that this was silly but that they had to check in.[19]

Busch reported to work the next morning (October 22) and was told by Abeln that Budrovich wanted Kammer and him to resubmit their field pay hours for which he was paid on his October 23 paycheck.[20] However, according to Busch, that same day he overheard a telephone conversation between Abeln and another person in which Abeln said:

> I know who two of the union trouble makers are and I am not sure, but I think the third one is an operator . . . (after a pause) Well, I am not sure, *Jeff*, but I think I have a way to find out." [Tr. 129.] [Emphasis added.]

Busch testified that Abeln then walked out of the office and immediately asked him (Busch) who he thought was our best operator. Busch responded that he thought all were good but mentioned a specific operator as the best in his view.

Thereafter, Busch continued to check in with Abeln about the next day's work availability, and Abeln would always tell him how "silly" the procedure was and openly questioned why Budrovich was requiring them to call in.

On Sunday, October 26, Busch, who had just received his field backpay on October 23, received a call from Abeln at home and was informed that Budrovich had ordered him to tell Busch to stay home until further notice. According to Busch, Abeln asked him what this was all about and Busch told him that it was about field pay. Abeln seemed incredulous to Busch and stated he received field pay all the time. Abeln then suggested to Busch that he charge Budrovich a couple of extra overtime hours when he worked in the field as opposed to requesting field pay. Busch testified that he refused this, considering it to be dishonest; and that he would only put it for what he was entitled. Abeln then stated that he wished Busch would work things out with Budrovich, as Busch was really needed, that there was a lot of work; and this was the Company's busiest year in its history.

The following Monday morning, Busch went in to talk to Budrovich and spoke to him in his office about the layoff. According to Busch, Budrovich said that the Company has a morale problem but did not explain how this problem involved him.[21] However, Budrovich went on to say "off the record," the Company had enough work to hire another mechanic; on the record, it did not have enough work. Budrovich also asked Busch if he had had problems with the Union before, and volunteered that several other operators had had trouble with the Union, but the Union did not do anything about it; and if the Union did not, he would take care of it. Busch told Budrovich that he was not going against the contract or the people who represent him. Busch repeated his desire to get only the field pay to which he was entitled.

According to Busch, Budrovich then responded that he was tired of hearing the words "I" and "contract" and accused him of not being a team player.

Busch said that his last response was to tell Budrovich that he was not going to "kow tow"[22] to him and go against the union contract to be a team player. Busch asked Budrovich not to leave him hanging, and to let him know of his plans for him.

During the layoff, Busch went back on occasion to the Respondent's facilities to retrieve his tools for side jobs. [23] According to Busch, on October 28 at about 9 a.m., while retrieving tools, he saw Abeln and laborer Kenny Eckhoff changing the front springs on a crane and that Eckhoff was using an impact wrench and a hammer to tighten the spring bolts. On that same day, he also saw laborer Paul Rodgers welding a truck "headache" rack Kammer had fabricated the week or so before. Busch considered the laborers to be doing mechanic's work, and in fact had never seen Rodgers performing welding before. Busch went back to the shop on October 29, again to retrieve his tools, and observed Eckhoff changing tires on a crane—a task normally

[17] The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors*, 157 NLRB 1295 (1966).

[18] It should be noted that Kammer had been appointed steward by Saunders, the Union's business agent, on October 14, 1997, and that at that time Saunders was not aware of the field pay issue. As previously discussed, Kammer had submitted his own field pay request on October 20 for work at the quarry.

[19] Kammer basically corroborated this account of the October 21 meeting. This conversation forms part of charges in the complaint and will be discussed in the discussion of the October 21 8(a)(1) allegations.

[20] Both Busch and Kammer, as noted, resubmitted their timesheets. See GC Exh. 9 (Busch) and GC Exh. 4 (Kammer).

[21] According to Busch, Budrovich never explained what the morale problem was.

[22] Busch used somewhat more colorful language to describe what he was not going to do. I have substituted "kow tow" for Busch's choice of words to capture the gist of the conversation. See Tr. 134.

[23] Busch lived only a few minutes from the Respondent's facilities.

performed by the operator. On October 31, Busch again came back to get tools and observed Eckhoff and Rodgers doing a routine service on a 35-ton crane,[24] a function he had never seen them perform before but had been a part of Busch's regular mechanic duties.

On about November 1 or 3, Busch, accompanied by Kammer, went to the union office and filed a grievance complaint against the Respondent based on his observations of the nonunion laborers performing union mechanic's work, when the Respondent had laid him off allegedly for lack of work.[25]

Kammer also testified regarding the circumstances surrounding his layoff. According to Kammer, on October 22, he met with Budrovich who expressed to him his general displeasure with his asserting his field pay rights and having the contract "thrown in his face," and that he would not pay field pay.[26] Later that same day, Kammer overheard a telephone conversation in which Abeln said "[I]t is not going too good here; there's three or four troublemakers here, and the [union] hall came down and appointed one of them steward . . . I don't know what the big problem is, but they got Jeff mad."

According to Kammer, he felt that he was being required to call in as a result of his claims for field pay but he, nonetheless complied with the new procedure. Kammer associated the call-in procedure with his field pay claims because Abeln called him on one occasion and told him that he knew the procedure was "silly" but that Budrovich had ordered him to call and advise Kammer when to report for work. On October 27, Kammer reported for work and was approached by Abeln who told him there was no work for him and that he was to go home. According to Kammer, Abeln confessed that there was to his knowledge "something" in the contract regarding a steward's entitlement to continued employment in work reduction situations, but that Budrovich had concluded that any such provisions did not apply to Kammer. Kammer then went to Budrovich in his office to confirm Abeln's claim that there was no work.[27] Budrovich's response to Kammer was that the matter had been discussed with the Union and the clause did not apply to Kammer.[28]

Kammer later called Saunders and met with him in the Union's office around 10:30 a.m. on October 27. Saunders called Budrovich and, in Kammer's presence, asked Budrovich why Kammer was being laid off. Saunders told him after conclusion of this conversation that Budrovich said things were slow. According to Kammer, he was surprised about the lack of work because on October 22, Abeln had taken him on a tour of the yard and pointed out a number of projects, including in particular several trailers that needed substantial overhaul and repairs. Also, at the time of his layoff, Kammer said he then was working on a crane and making a headache rack for a trailer and had not completed these assignments. According to Kammer, his last day of work was October 27, when he was notified that there was no work for him.[29] According to Kammer, neither Budrovich nor Abeln ever gave him any warning of a possible layoff, and he observed no equipment loss or reduction or other slowdown in work activity before he was laid off.

Budrovich testified that he indeed directed Abeln to put Kammer and Busch on on-call status in October 1997 because work had been slowing down and the Company had unsuccessfully bid on as many as five projects. Consequently, he thought that the Company was going to be in for an unprofitable winter, and the weather was also bad at that time. According to Budrovich, he could not see enough work for six people (four mechanics and two laborers) and he could not afford to carry them. Budrovich denied any connection between placing Busch and Kammer on call and the field pay issue. According to Budrovich, once he understood what field pay was, he paid it. Furthermore, Budrovich said that he told Saunders in advance that layoffs were coming and that Kammer would be first to be laid off. He did this because he did not want a problem with the Union due to Kammer's holding the steward position. According to Budrovich, Saunders indicated that there would be no problem and he should deal with the issue when it arose. Budrovich denied ever using any profanity and threats to fire Kammer or Busch.[30] Budrovich stated that his accountant suggested that since the shop does not produce revenue and at the same is the activity where most expenditures (parts and service) occur, cutbacks should first be made there.

According to Budrovich, he anticipating recalling Kammer and Busch when work picked up but changed his mind because of events that occurred on November 3.

Abeln testified that in September 1997, Budrovich advised him of possible cutbacks in the mechanical shop and Budrovich told him to put Kammer and Busch on on-call status, as they had the least seniority in the shop.

Abeln testified that he did not know what field pay was or that it existed until Busch and Kammer raised the issue in late September with Budrovich.

Abeln stated that it was Budrovich's idea to lay off Busch and Kammer. According to Abeln, Budrovich called him over the weekend before October 26 and told him that because of rain, to keep both men home. Budrovich told him that they would be recalled in a few days and that he would wait to see if work picked up.

While Abeln could not reach Kammer over that weekend, he did talk to Busch on that Sunday. According to Abeln, he told Busch to come in or Monday and attempt to work things out with Budrovich because he viewed Busch as a good mechanic and did not want to lose him.[31] Abeln denied that at the time of the layoff that field pay was at issue or that there had been any arguing between Busch, Kammer, and Budrovich about the matter. Abeln admitted that the winter of 1997–1998 was one of the Respondent's busiest seasons but that it was not busy in the shop in October, that in fact shop work had slowed quite a bit. However, Abeln admitted that around Christmas, business really picked up and Budrovich hired another mechanic, Mark Fallert, around the first of the year (1998).

Discussion and Conclusions Regarding the Layoff

The General Counsel argues, in essence, that the Respondent's layoff of Kammer and Busch was motivated by and the result of two mechanics' assertion of rights guaranteed them in the contract; that they were discriminatorily and disparately treated because of their concerted assertion of those rights. The General Counsel contends that the Respondent's reasons—work slowdown and loss, and inclement weather—for the layoffs are mere pretexts and/or not sufficiently substantiated. The Respondent, in addition to its proffered economic and weather related defenses, contends that it was legally entitled to place the mechanics on on-call status, and that the field pay issue had no bearing on the layoff decision.[32]

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[24] Routine servicing included changing fuel, air, oil filters, and lubrication.

[25] R. Exh. is a typewritten version of Busch's handwritten complaint that he filed with the Union.

[26] This meeting and what transpired there is more fully discussed here in the context of the 8(a)(1) allegations.

[27] According to Kammer, Abeln disavowed any knowledge of the actual terms of the contract, claiming that he never possessed a copy of the booklet.

[28] The contract provides in sec. 8.07 at p. 42:

> . . . The Employer agrees in the event of reduction of the work force, that the employee appointed as a steward remain on the job as long as there is work of his craft which he is capable of performing.

Union Business Agent Saunders testified on cross-examination that in his judgment, being the union steward did not have any effect on who was first laid off, that there was no "seniority" applicable. While Saunder's position appears to be at odds with the contract and he did not state that he had spoken to Budrovich about the matter, it seems that Budrovich may have relied on Saunders' or the Union's interpretation of this clause.

[29] Kammer testified that he was never given an explanation for his layoff with the exception of there being no work.

[30] Saunders testified that on or about October 16–18, he called Budrovich regarding the field pay issue and told him that field payment must be paid to the mechanics. According to Saunders, Budrovich became irritated and said that he would fire them. Saunders advised Budrovich to think about the matter because firing them would be a direct violation of the Act. (Tr. 190–191.) On October 27, according to Saunders, Kammer came to the union hall and advised that he was no longer working and that he was being punished by Budrovich. Saunders called Budrovich and was told that there was no work. Saunders suggested to Budrovich that it was advisable under the circumstances to get Kammer (and Busch) back to work. However, Budrovich insisted to him that there was no work.

[31] When asked what there was to work out and the kind of problem there was to work out by the General Counsel, Abeln became very evasive and stated that working things out was a mere "figure of speech." (Tr. 319.)

[32] The Respondent also asserts that it was within its right to hire union mechanic Mark Fallert without recalling Busch or Kammer for various stated reasons and, consequently, did not violate the Act in hiring him. The Respondent has not been charged with any violations of the Act appertaining to Fallert so that, in my view, this proffered defense is inapposite to the allegations in the complaint. Accordingly, I

As is often the case, the credibility of witnesses serves as the springboard for resolution of disputed facts and here, too, credibility looms large, if not decisively. I found both Busch and Kammer to be highly credible witnesses, testifying both in a forthcoming and consistent manner. Additionally, their version of events seemed plausible, internally consistent, and corroborated. I also found Saunders' testimony credible in pertinent part. However, the Respondent's primary witnesses did not impress me. I found that Abeln, in particular, either was evasive in his responses, self-serving and/or unduly protective of the Respondent and, consequently, his testimony was lacking in candor and forthrightness. For instance, I find it highly unlikely that Abeln, with 14-1/2 years experience as union mechanic and operator, would not, as he testified, even know what field pay was, and his attempts to downplay the significance of the issue to Budrovich did his cause little good.[33] As for Budrovich, he, too, did not come across in a wholly credible way, and his denials of any connection between Busch and Kammer's demand for field pay and his subsequent acts—requiring them without precedent to call in and ultimately laying them off—seem quite disingenuous.

Budrovich's claim of ignorance and no understanding of contractual field pay does not ring true, considering he was "chief cook and bottle washer" of a well-established longtime multimillion dollar company which was signatory to the contract in question; and this served to undermine his credibility to me. Moreover, Budrovich's claims that inclement rainy weather and several unsuccessful bids for work were the combined reasons for laying off Busch and Kammer seemed contrived. First, the Respondent's business entails heavy construction and excavation and although weather conceivably could adversely affect this type of business, it seems to me that the weather conditions would have to be very extreme to halt this type of essentially outdoor rugged work activity. The Respondent's claim of rainy conditions (deep mud and wetness) sufficient to justify the layoff was not, in my mind, sufficiently established. I note that the General Counsel produced climatological records for the relevant time frame for the St. Louis area,[34] which actually showed very little precipitation on average in October and November 1997. Granted these records only covered weather conditions at the St. Louis International Airport but aside from claims of "rain" for 5–6 days prior to the October 27 layoff, the Respondent offered no rebuttal to these figures. In short, as Busch testified, operating engineers (especially mechanics) are used to working in bad weather and/or other poor conditions. In my view, the Respondent's claim of weather related slowdown was not persuasively established. To the extent the Respondent asserts inclement weather as a defense, it failed to meet its burden. In fact, I am at pains to see where there was such a slowdown at all in sales at or about the time of the layoff that would justify the unprecedented layoff of the two mechanics. To that point, the Respondent produced records prepared for this case tending to show comparative sales figures of the Respondent's contract (equipment leasing) and excavation operations over a 3-year period (1995, 1996, and 1997) by month.[35] An examination of these records for the period covering October through December for each of the 3 years discloses that in October 1997 through December 1997, contract sales were greater than comparable periods in 1995 and 1996; for excavation, total sales in October–December 1997 were much better than a comparable period in 1996, although not nearly up to 1995 sales levels. All in all, in 1997, when Busch and Kammer were laid off, I see little or no "bottom line" economic justification for the Respondent's sending them home.[36]

Likewise, I do not believe the Respondent, by the preponderance standard, substantiated the claim that it suffered a loss of significant business through unsuccessful bids. Notably, the Respondent produced no documentation to show that it had actually bid on projects and was unsuccessful or that its lack of success indirectly or directly led to the layoffs in question; nothing save Budrovich's naked self-serving testimony was adduced to substantiate these claims. On bottom, I believe this aspect of the economic justifications offered by the Respondent was a pretext and a mere subterfuge to disguise its true reason for laying off Busch—their demand for full pay at the contract rate. Also, I am not convinced that, as asserted by the Respondent, there was little or no mechanic's work for the two. Significantly, Busch credibly testified that he saw on more than one occasion after the layoff, laborers performing work he was qualified to do, and did perform while employed by the Respondent. Busch timely complained about this to the Union. Union mechanic Ronald Baisch, who was not laid off, credibly testified about the work environment at the Respondent's facilities after the two were laid off. In addition to not being required to call in and never told to call in, Baisch observed no diminution of his mechanic chores and testified that there was other mechanic's work available to do. Furthermore, Baisch witnessed a nonunion son of a Budrovich family friend doing customary mechanic's work after the layoff.[37] Also, Frank Sonderman, an operator employed by the Respondent, testified essentially without contradiction that he saw laborer Eckhoff in November 1997 installing springs on a crane, work that was customarily mechanic's work that Eckhoff had never performed previously. Sonderman also observed landfill employees doing mechanical work on a machine after Busch and Kammer's layoff, and saw laborer Rodgers performing oil changes and other equipment maintenance work around the shop.

The Respondent offered a veritable plethora of excuses and rationalizations to counter clear evidence of the availability of and its continuing need for mechanical work and workers in spite of the alleged purported slowdown in its business. However, in my view, these must be rejected. In my view, the General Counsel amply demonstrated that there was ample mechanical work for Busch and Kammer. Notably, in Kammer's case, he was not even allowed to finish work he had started such was the abruptness of his layoff.

It is also most significant to me that with the exception of Busch and Kammer, it appears no other employees were laid off for weather or economic reasons after October 27 and through November and December of that year. More to the point, no operators were evidently laid off, which belies the claim that the Respondent's business had slowed such that the two union mechanics were no longer affordable.[38]

As to the animus issue, to me, it is clear that the Respondent harbored a dislike and even disrespect for the Union, which directly influenced its decision to lay off the two mechanics who, after all, were asserting rights won by the Union in the contract. The record here is replete with such evidence. For example, Abeln's "union troublemaker" statements in a conversation with (Jeff) Budrovich clearly evince hostility to the Union. Also, there is Budrovich's hostility to Kammer and Busch for simply asserting their rights under the contract; and the disparaging remarks made by him about the contract, coupled with his evident disdain for the Union itself as he directed his employees to disregard union contract rules. These amply demonstrate animus. Thus, by conduct and statements of the Respondent's supervisor and agents, it is clear to me that the motivating factor for Busch and Kammer's layoff was directly related to their engaging in protected activity and/or their involvement with the Union. Therefore, the General Counsel has clearly met its *Wright Line* burden, and I would conclude and find that the Respondent violated the Act in laying off Busch and Kammer.

D. The 8(a)(3) Termination Allegations

As noted previously, Busch and Kammer filed separate charges against the Respondent and Abeln with the Union on November 3. After filing, both men proceeded together to the Respondent's facilities to pick up their tools stored on the premises. Once there, Busch and Kammer were assisted by several of the Respondent's employees in the loading of the tools

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have not considered the legality vis-a-vis the Act of the Respondent's hiring Fallert in this decision.

[33] Notably, in his affidavit of April 13, 1998, Abeln averred, rather matter of factly, that "I receive field pay when I go into the field" in GC Exh. 23 (p. 3).

[34] See GC Exh. 26. These certified records were obtained from the U.S. Department of Commerce, National Climatic Data Center for the period covering September 1997 through March 1998.

[35] See GC Exh. 22.

[36] Budrovich testified that he did not care about sales numbers; he looks at the bottom line, that is, profit and loss. However, the Respondent did not produce records to show that, as Budrovich said, he "did not have money coming in" (Tr. 456) or that his expenses exceeded the sales numbers. Incidentally, the Respondent's records tend to corroborate Saunders' testimony that the period in question was one of the busiest in history for operating engineers and the companies that employ them. Thus, in my view, the Respondent did not sufficiently establish through proper documentation that the layoffs were justified. See, e.g., *Hoffman Plastic Compounds, Inc.*, 306 NLRB 100 (1992).

[37] This person was Jonathan Henry, a young man who, according to company records, worked for the Respondent from December 16, 1977–February 29, 1998. See GC Exh. 17. These records indicate Henry performed work that was mechanical in nature.

[38] I am cognizant that the Respondent asserts that more than 30 of its operators were laid off in the last few weeks of October. However, the Respondent did not produce evidence of the operators' return to work from any such layoff which suggests they were not indeed laid off. Budrovich himself could remember only 2 or 3 days of layoffs due to weather in the winter months of late 1997 and early 1998. (Tr. 461.)

onto Kammer's truck. Kammer and Busch made two trips to complete the task. The Respondent never recalled them to work at any time after November 3.

The complaint alleges that the Respondent unlawfully discharged Busch and Kammer on November 3. The General Counsel contends, in essence, that their termination was directly related to the field pay issue which, she argues, had engendered an extreme hostility toward the mechanics on the Respondent's part. She further argues that the Respondent had only grudgingly paid them field pay and laid them off in retaliation. She contends that when the men picked up their tools, the Respondent basically took advantage of that situation and angrily, without justification, fired them. Finally, the General Counsel asserts that the Respondent's defense that the men voluntarily quit was simply manufactured to provide cover for its unlawful termination of the union mechanics.

The circumstances of the tool retrieval warrant discussion. According to both Busch and Kammer, each decided to retrieve their tools which represented a substantial investment for them—$30,000 for Busch and $8000 for Kammer—and considering that each had filed charges against Budrovich and Abeln, they reckoned it might be some time before they were recalled. Moreover, neither mechanic had been advised as to how long they would be out of work. They arrived at the Respondent's facilities around 2 p.m. on November 3 and began loading Kammer's truck. Douglas Kollmeyer, an oiler, helped in the effort and asked what they were doing, and specifically whether they were quitting. Busch said he told Kollmeyer that he was not quitting but that his tools were too big an investment to sit there while Budrovich was making up his mind how long he would be off work. According to Busch, Kollmeyer said he understood and continued loading the tools.[39] The retrieval effort required two trips. On the first, both Busch and Kammer observed Abeln and Budrovich in the shop and neither man approached them nor otherwise inquired as to what was going on; on the second trip at around 4 p.m., Busch and Kammer again saw Abeln and Budrovich and again nothing was said. Both Busch and Kammer testified that they did not say anything to management or the assisting employees about quitting or about the complaints they had filed earlier. Both Busch and Kammer testified they never formally resigned and never received any correspondence from the Respondent regarding their employment status with the Company. Busch and Kammer stated that in fact they said absolutely nothing to management while they were conspicuously removing their tools. According to Kammer, he received a call from Saunders later on November 3 and was asked whether he had picked up his tools and advised that Budrovich had paged him. Kammer acknowledged picking up his tools. On November 4, Kammer again spoke to Saunders who said he had spoken with Budrovich. According to Saunders, Budrovich told him that Busch and Kammer had picked up their tools and as far as he (Budrovich) was concerned, the two were fired.[40] Busch said he learned of his termination from Kammer who had relayed the conversation with Saunders.

Budrovich testified and admitted seeing Kammer and Busch loading their tools. According to Budrovich, he fully anticipated recalling them when worked picked up. However, on that day, when they drove right by his office and did not acknowledge or speak to him, he assumed that they were quitting although they never said as much. Budrovich said he called the union hall that day and Saunders returned his call the next day and in that conversation, he related that the mechanics had picked up their tools and he assumed they were quitting. Saunders said he knew nothing about the matter and would get back with Budrovich. According to Budrovich, Saunders never called him back. Budrovich denied firing the two mechanics but did not ever recall them because, their having quit without giving him notice, he considered them unreliable, disloyal, and disruptive.

Abeln testified that indeed he, too, observed the two mechanics picking up their tools on the day in question and he assumed they were quitting. According to Abeln, he did not consider Kammer a particularly good mechanic and in the end did not believe he could get along with him. (Abeln candidly admitted that Kammer's filing charges against him would make for a difficult working relationship and would influence his decision whether to recall him.) Abeln considered Busch a good mechanic and in spite of Busch's "trashing" him to Budrovich after Busch left and his resulting bitterness with Busch, he, nonetheless, felt he could have worked with Busch. In short, his deteriorating relationship with Busch did not influence his decision not to recall him back.[41]

In my view, the mere picking up of tools by two laid-off employees is at best an ambiguous act. Certainly Busch and Kammer were within their rights to pick up their tools and commonsense dictates no reason for one to leave costly items in the care of someone else. Busch and Kammer, as they testified, did not know that the Respondent's insurance covered their tools. But it made eminent good sense for them to protect their own investments as opposed to subjecting themselves to the uncertainties (and possible controversy) of the (Respondent's or their homeowner's) insurance claims process.

I believe that Budrovich fired Kammer and Busch on November 3 and that their discharge was directly related to the field pay controversy that, in my view, still was stuck in Budrovich's craw on November 3. I believe that Budrovich was indeed offended and angry by the way Busch and Kammer handled the tool retrieval, but based on the record as a whole, were it not for the overarching field pay controversy and its aftermath, I do not believe he would have terminated them for slighting him. Thus, I have not credited the Respondent's defenses, to wit, that it viewed Busch and Kammer's retrieval of their tools as a voluntary quit, and that it would not have recalled them because it considered them unreliable, disloyal and disruptive. I would conclude that the Respondent violated the Act in discharging Kammer and Busch on November 3.

E. The October 21, 1997 8(a)(1) Allegations

The complaint alleges (in part 5A) that on or about October 21, 1997, Abeln told its employees, to wit, Busch and Kammer, that Budrovich was angry with them for asserting their rights to field pay under the contract and that he was going to (and did) revoke a special privilege it accorded to mechanics, that is, not having to call in to determine availability of work for the next day, all in violation of Section 8(a)(1) of the Act. The complaint also alleges (in part 5B) that on the same day, Budrovich told an employee, to wit, Kammer, that he was unhappy with him for asserting and insisting on contract rights and implied that he might lose work (hours) for asserting those rights, and that employees who assert contract rights were of less value to the Respondent than those who did not.

As discussed in the 8(a)(3) part of this decision, Busch and Kammer testified that around 3:15 p.m. on October 21, Abeln told them that Budrovich was angry about "what was going on," and that henceforth the mechanics would be required to call in prior to coming to work the next day. The conversation, according to Busch and Kammer, occurred in the context of prior meetings and conversations with Budrovich about field pay. Abeln testified about this meeting and acknowledged telling both Kammer and Busch together about the policy change. Abeln did not address in his testimony Budrovich's being angry but admitted he was acting on Budrovich's instructions and, as a justification, stated that work was slowing down. I would credit Busch and Kammer's version of the conversation between themselves and Abeln for reasons previously discussed in the 8(a)(3) part of this decision.

As to the 8(a)(1) charge, Kammer testified about matters occurring between Budrovich and himself a little while after Abeln's meeting.

According to Kammer, after he was advised by Abeln of the change in the call-in policy on October 21, he went in to see Budrovich in his office around 3:32 p.m. to discuss the change in policy. Kammer said he asked Budrovich about designating a starting time for the mechanics and Budrovich retorted that a starting time for mechanics was not his concern; rather, whether mechanics were needed at all. Kammer then told Budrovich that he assumed the change in call-

[39] Kammer basically corroborated this encounter. He testified that Kollmeyer asked what they were doing and Kammer responded they were just picking up their tools awaiting recall because management had said things were slow. The Respondent called Kollmeyer who happens to be Budrovich's cousin, who testified that he assumed Busch and Kammer were quitting. However, when asked by the General Counsel did he ask whether Busch was quitting, Kollmeyer became evasive and seemed unable to understand this simple question. He eventually testified that he was unable to remember Busch telling him that he was not quitting. I did not find Kollmeyer particularly credible.

[40] Saunders testified and confirmed the November 4 conversation with Budrovich. According to Saunders, Budrovich asked him why Busch and Kammer were picking up their tools. He responded that they were protecting their tools. According to Saunders, Budrovich became pretty upset and said "f— them, I will fire them." (Tr. 192.) Saunders was "sure" that he communicated the firing remark to Kammer or Busch.

[41] It should be noted that Abeln did not have the ultimate authority to lay off, recall, or not recall; that authority was vested in and exercised by exclusively Budrovich. Accordingly, Abeln views regarding the Respondent's decision not to recall Busch and Kammer are not controlling here. I note that Budrovich testified he felt that Abeln could not overcome the residual effect of both Busch and Kammer's charges.

in policy was now made because he submitted a timesheet that included field pay. According to Kammer, Budrovich agreed saying, "I saw your time sheet and I was not happy with what is going on." Kammer explained to Budrovich that all he wanted was to be paid for hours he worked at the rate to which he was entitled. According to Kammer, Budrovich then told him that he was tired of the contract being thrown in his face and would not pay field pay. However, Budrovich also told Kammer that he liked Kammer's work and his attitude toward work but that he (Kammer) was not on the same level as the men who play by the rules, that the only rules that mattered were his (Budrovich's) rules. Budrovich repeated that he would not pay field pay although to him field pay equaled only $10 per day (per worker). According to Kammer, Budrovich then asked Kammer how much field pay he was seeking. Kammer then explained that he had worked 15 days in the field but had only requested 1 day's worth, mainly to keep Budrovich reminded of the issue he had raised with him previously. According to Kammer, Budrovich then said "15 days at $10 per day, I can eliminate all of that if I just have you sit home one day." Kammer said he then told Budrovich that this (the policy change) was a punishment of Busch and himself for asking for something to which they were entitled. Budrovich's only response was that he would not pay field pay and that he (Kammer) was arguing over pennies. Kammer stated that he was arguing over principle and that Budrovich was the only one arguing over pennies. The conversation ended with Kammer telling Budrovich that he was going to check with Abeln about the availability of work the next day.

Budrovich testified about a meeting he had with Kammer but could not remember the date, only that it occurred in his office one day after work and lasted around 10–15 minutes. According to Budrovich, the focus of the conversation was a morale problem at the Company and, he was sure, Kammer's timesheet requesting field pay. However, Budrovich could not recall specifically what was said about field pay or that he even saw Kammer's timesheet. Budrovich remembered telling Kammer about his unhappiness with what was going on in the shop and that sometimes the Company bent the union rules because it was close-knit but did not break the rules. Budrovich explained that some mechanics will run cranes although union rules prohibit this; they do it to help him and the Company. However, according to Budrovich, he was not referring to the field pay issue as part of the bending of rules because he felt that the field pay was not a big issue. Furthermore, he denied telling Kammer he would not pay field pay. Budrovich admitted that he told Kammer he was arguing over pennies and he could not understand Kammer's being so upset over field pay although he realized Kammer (and presumably) Busch believed they were entitled to it. Budrovich acknowledged that Kammer expressed to him that he (Kammer) was standing on principle and Budrovich was arguing[42] over pennies. Budrovich also admitted that there was a discussion about rules, noting that Kammer did not particularly like the Company's rules—"the way we did things." Budrovich denied that Kammer told him the policy change was punishment for seeking field pay. Budrovich also denied telling Kammer that he was not on the same playing field as the men who played by Budrovich's rules. However, he did tell Kammer "there are guys here that have been here a long time, that have always played not necessarily by the Union rules but by the rules or the ways that we do things." (Tr. 486.) However, Budrovich denied telling Kammer that he (Kammer) was not playing by those rules. Budrovich admitted telling Kammer he was arguing over less than a day's pay (with respect to field pay) but denied telling Kammer that (the field pay issue) would be eliminated if he sat home for a day.

The Applicable Legal Principles

Section 7 of the Act ensures that employees have the right to engage in concerted activity for the purpose of mutual aid and protection. 29 U.S.C. § 157.

In *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), the Supreme Court endorsed the Board's basic rule as stated in *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967), that individual activity directed at the enforcement of a collective-bargaining agreement is concerted activity. Unless the concerted activity is shown to have been conducted in an abusive manner or purpose, it is protected under Section 7. *Peter Vitalie Co*., 313 NLRB 971, 975 (1994). It is also required that the employer must have known or believed that the action was part of group action on behalf of a group of employees. *Mannimark Corp*., 307 NLRB 1059 (1992).

Thus, it is generally well settled that when an employee who complains about his terms and conditions of employment and asserts a right grounded in the governing collective-bargaining agreement, that employee is engaged in concerted activity protected by Section 7 of the Act; if the employer takes adverse action for such activity, then the action violates Section 8(a)(1).

Busch and Kammer, on the irrefutable evidence here, clearly during the months of October 1977, at first separately and then jointly banded together to seek their field pay entitlements guaranteed them under the contract from the Respondent. The only question is whether the Respondent's statements to them, either through Supervisor Abeln and Budrovich, and the revocation of the mechanic's call-in policy were violative of Section 8(a)(1). Notably, motive is not an essential element of an 8(a)(1) violation. The Board's longstanding test for 8(a)(1) violation is whether the employer engaged in misconduct, including speech which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co*., 124 NLRB 146 (1959); *Roadway Express*, 250 NLRB 393 (1980), or impede or discourage union involvement. *F. W. Woolworth Co.,* 310 NLRB 1197 (1993). The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors),* 318 NLRB 109 (1995).

Discussion and Conclusions of the 8(a)(1) Allegations

The mechanics under the Respondent's system historically were not required to call in, as were other employees at the Respondent's facilities. Clearly, this was a prerequisite or special privilege reserved to them. Furthermore, it is beyond cavil that the Respondent changed the policy and required Kramer and Busch to call in coincident with their seeking payment for offsite work. It is also clear to me that Budrovich was not pleased with either Kammer or Busch for requesting full pay, and only belatedly (and seemingly grudgingly) paid them after several confrontations.

The Respondent defends its action on essentially two grounds. First, that the contract permitted it to put the mechanics on call-in status, and second, that the call-in procedure was warranted by the prospect of rainy weather, the onset of winter, and an expected work slowdown. The Respondent also contends that the amount of money involved with field pay is basically a paltry sum and had nothing to do with the policy change. The General Counsel contends that Budrovich himself admitted that he was angry with Bush and Kammer about what was going on in the shop and the only "thing going on" was the field pay issue, about which Kammer and Busch had confronted Budrovich on several occasions. Furthermore, she argues, the Respondent's foreman, Abeln, though reluctant to admit it, acknowledged that Busch and Budrovich were, at a minimum, at serious odds over field pay. She suggests that the final straw was Kammer's request for field pay on October 20, exactly 1 day before Abeln notified Busch and Kammer (but not the remaining general mechanic, Baisch) of the policy change. She submits that the Respondent's action constituted a violation of Section 8(a)(1) because of its threatening and coercive nature.

Based on the totality of the facts and circumstances, I would agree with the General Counsel. To the extent the Respondent attempts to justify the change in policy on business necessity, the defense fails. First, as I have determined in the 8(a)(3) discussion, I have deemed the Respondent's economic defense in the main pretextual and therefore of no moment for purpose of the 8(a)(1) allegations. Second, while the Respondent is at liberty under the contract to determine reporting for work requirements,[43] under the circumstances here, the Respondent changed the policy in a retaliatory and discriminatory way, applying as it did only to the two mechanics who asserted their rights under the self-same contract.[44] Third, while the field pay amounts do represent a relatively small amount of money, the significance of the matter cannot be measured in pure dollars and cents. To be sure, the Respondent's extreme reaction to the field pay request—revoking a longstanding policy and ultimately laying off two good and hard-to-replace mechanics—indicates that money was not the issue. Rather, the field pay issue posed a threat to the Respondent's chosen way of doing business and interpreting the contract, the Union notwithstanding.

[42] Budrovich was not sure if the term "argue" was used in this conversation but agreed to the gist of the statement. (Tr. 484.)

[43] The contract in art. 5 allows the Employer the privilege of notifying employees not to report for work due to inclement weather or changed job conditions. In my view, this gives the Employer the right to establish a call-in policy for its employees.

[44] I specifically do not credit Abeln's testimony that the policy change was to apply to all of the Respondent's mechanics. First, as later events disclosed, the policy did not. Mechanic Baisch truthfully testified that he was never asked to call in although Abeln raised the possibility to him. Moreover, in spite of alleged inclement weather and work slowdown, Baisch continued his mechanical assignments without interruption. Thus, in my view, Abeln's testimony regarding the necessity of the policy change for business reasons does not ring true.

Thus, in my view, the Respondent's revocation of the no-call-in policy and its handling of the field pay issue combined in effect and purpose to coerce and threaten the Respondent's employees. In my view, it is precisely this type of employer behavior that tends to coerce and intimidate employees, and, perforce, interfere with rights guaranteed by the Act.45

Accordingly, I would find that the Respondent's revocation of its mechanics' no-call-in policy was predicated on Busch and Kammer's insistence on compliance with the contract's provisions regarding field pay, and that the revocation was violative of Section 8(a)(1) of the Act, tending as it did to coerce and interfere with Busch and Kammer's as well as the Respondent's other employees' exercise of rights guaranteed them under Section 7 of the Act.

As to the allegations contained in part 5B of the complaint, the General Counsel argues that Kammer presented as a credible, knowledgeable, and straightforward witness whose testimony, if believed, clearly establishes a violation of Section 8(a)(1) as set out in the complaint. In its answer, the Respondent generally denied any violation of the Act with respect to paragraph 5B of the complaint. However, the Respondent did not address this charge in its brief. Perhaps this was due to inadvertence or oversight by the Respondent's counsel. Be that as it may, the issue remains whether based on the credible evidence, the General Counsel has established the violation as charged. As a general proposition, I would agree with the General Counsel's view of Kammer as a witness. I was impressed with his candor and apparent sincerity and directness in answering questions posed by both counsel and the court. I was not, however, as favorably imposed with Budrovich's testimony regarding the meeting he had with Kammer. Budrovich seemed somewhat evasive in his answers, his memory was sometimes faulty, and his responses seemed somewhat cagey and guarded. Accordingly, between the two, Kammer was the more credible witness and I would credit his version of the conversation he had with Budrovich.

The General Counsel contends that in essence, consistent with the charge, Budrovich's stated unhappiness with Kammer and Busch's pursuit of field pay, combined with his statements about other employees' willingness to bend the rules to satisfy the Respondent's work requirements, redound to threats of retaliation and loss of work for engaging in protected concerted activities. I would agree. In likewise, I believe that Budrovich's statement that Kammer (and presumably Busch) were not on the same playing field as other employees who played by his rules coupled with his implied threat to keep Kammer at home to eliminate the field pay issue altogether were also violative of Section 8(a)(1). It is clear that Budrovich's remarks were directed at Kammer and Busch's assertion and pursuit of their contract-sanctioned field pay entitlements. In no uncertain terms, Budrovich attempted to interfere with these employees' assertion of their rights and discourage them and other employees from seeking field pay entitlements covered by the contract by veiled threats of loss of work and treatment less favorable to that received by employees who were willing to "bend" the contract rules.

F. The Respondent's Collyer Defense

In its amended answer(s), the Respondent asserted by way of an affirmative defense that this matter should be deferred to the arbitral process contained in the contract. In its brief, the Respondent did not address this defense. Again, perhaps this was due to oversight, inadvertence, or other innocent reason.46

The Board's deferral policy is incorporated in what has been described as the *Collyer* Doctrine, first announced in *Collyer Insulated Wire*, 192 NLRB 837 (1971), where the Board held that under certain circumstances, it would require exhaustion of contract grievance procedures, including arbitrating before it would consider unfair labor practice claims. In deference to the agreements bargained for by labor and management, the Board would require arbitration when: (1) there was a longstanding bargaining relationship; (2) there was no enmity by the employer toward the employees; (3) the employer was willing to arbitrate; (4) the arbitration clause covered the dispute; and (5) the contract and its meaning were at the center of the dispute. Id. at 842.

Applying the foregoing principles to the pertinent facts here, I would agree with the General Counsel and conclude that deferral is not appropriate. First, as to Kammer's charge, it was not made pursuant to the contract; rather, it was an internal charge against a fellow union member, clearly a matter not covered by grievance or arbitration mechanisms of the contract. Second, while Busch's grievance against the Respondent ostensibly would be covered by the arbitration clause, deferral is not appropriate. Notably, while the parties here have a bargaining relationship of over 20 years, there clearly is enmity between the Respondent and the two affected employees. Also, the record reflects the Respondent's evident proclivity to disregard the terms of the contract when it sees fit and for its own business convenience and not worry about the consequences with the Union. Furthermore, while Busch's grievance may be covered by the arbitral process, it cannot be gainsaid that the contract and its meaning were at the center of the dispute which, as alleged, focused on allegations of fact which, if proven, were clearly violative of the contract and not subject to divers interpretations. Finally, the Respondent here asserts deferral as a defense, but nowhere on the record or in the investigatory stages of this matter has it shown that it was sincerely willing to arbitrate Busch's grievance at any time before my hearing this case. Although by its silence in its brief, the Respondent may well have acceded to the inappropriateness of deferral here, I would conclude that deferral was and is not an appropriate mechanism to resolve the matter. I note in passing that arbitration would not have resolved the 8(a)(1) allegations charged in the complaint.

G. The March 1998 Interrogation of Michael Lillicrap

The Respondent (through Abeln and Budrovich) have been charged in the amended complaint with unlawfully interrogating one of its employees in the course of its investigation of the unfair labor practice charges appertaining to this case.

The affected employee, Michael Lillicrap, testified at the hearing. He has been employed by the Respondent for around 20 years; he is a member of the Union and operates cranes. According to Lillicrap, sometime in March 1998 in the presence of two other of the Respondent's employees, Abeln approached him in the shop and asked him to sign a form, which he refused to do. Abeln advised Lillicrap that signing the form was voluntary and if he did not sign it, nothing would happen to him. According to Lillicrap, he did not read the form but "knew" what it was about.47 However, Abeln did not tell him of the form's contents or purpose, only that it had nothing to do with him (Abeln). Lillicrap again refused to sign the form and left the area and went back to work.

Later that same day (around 5 to 5:30 p.m.), Lillicrap said that he was in the office and, in the presence of two other employees, Budrovich approached him and said to him that he needed 20 employees to sign a paper stating that the Respondent got slow in the winter. Budrovich indicated that his signing would be kept confidential although Budrovich conceded that he could be subpoenaed. Lillicrap volunteered that while he could at that time agree with Budrovich that the Respondent does experience a slowdown in the winter, it was only with respect to operators; nonetheless, he decided that he did not want to get involved in what he saw as a dispute between the Union and the Company. Accordingly, he refused to sign the paper, which he never actually read.48 According to Lillicrap, Budrovich did not tell him that there would be no reprisals taken against him if he did not sign the paper nor did he advise him that signing was voluntary. However, Budrovich ended the conversation by telling Lillicrap that he was either for or against him. Budrovich then took a telephone call, and Lillicrap left the office.

Neither Abeln nor Budrovich testified about the incident involving Lillicrap, and the "paper" Lillicrap was asked to sign was not produced.49 While the actual contents of the paper are not known, it seems clear contextually that it related to the Respondent's defense to the instant 8(a)(3) charge that Busch and Kammer were laid off because of a business slowdown in the winter and probably represented the opinions to that effect of some of the Respondent's employees who may have signed it. Thus, Lillicrap certainly was being asked by the Respondent's high level supervisor to verify and validate a position the Company had taken with respect to an ongoing investigation by the Board of the possible commission of unfair labor practices by the Respondent.

The Board has consistently required an employer to advise employees interviewed or questioned in the investigation of unfair labor practice allegations, or in preparation for Board proceedings, that they have specific rights. Pursuant to the Board's ruling in *Johnnie's Poultry Co.*, 148 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965), the Board requires

[45] Significantly, Budrovich testified that since Busch and Kammer's departure, the field pay issue has never come up again. (Tr. 432.) In fact, the Respondent stipulated on the record that it has not received any requests for field pay and has not paid any field pay with respect to the period of time in question (Tr. 433.)

[46] Anticipating the Respondent's argument, the General Counsel addressed deferral in her brief.

[47] Lillicrap did not explain how he knew what Abeln was broaching to him but one could reasonably speculate that by March 1998, the issues surrounding Busch and Kammer's layoff were known by all employees.

[48] Although he did not read the paper, Lillicrap observed that "513" appeared on the top of the paper.

[49] I therefore have credited in toto Lillicrap's version of the events.

employers: (1) to instruct each employee of the purpose of the questioning; (2) to insure the employees that no reprisals will be taken against them; (3) to obtain the employee's permission on a voluntary basis to conduct the interview. The Respondent principally argues that the requirements of *Johnnie's Poultry* were substantially complied with in that Lillicrap was advised that he did not have to sign the document and that he would suffer no retaliation if he did not sign; moreover, Lillicrap did not sign the document and was not subject to any retaliation. Thus, in essence, the Respondent contends that under the totality of circumstances, its conduct here was not coercive.

While the Respondent's substantial compliance argument has some appeal, I would, nonetheless, find that, indeed, under the totality of the circumstances, the Respondent's conduct with regard to Lillicrap's interrogation was coercive and, hence, violated the Act.

First, with respect to Abeln's initial contact with Lillicrap, which took place in the presence of the employees, the Respondent basically met the requirements of *Johnnie's Poultry*, the only failing being in not specifically advising Lillicrap of the purpose of the document in question.50 However, Lillicrap testified that he knew what it was about and made a conscious decision not to sign. If the Respondent had let matters be at this point, I would be of a mind to find no violation of the Act on a de minimis standard. However, the interrogation did not stop here. Later the same day and again in the presence of other employees, the Respondent's highest level supervisor, Budrovich, and this time more aggressively, again attempted to obtain Lillicrap's signature, thus indicating the urgency of obtaining Lillicrap's signature to the Respondent and the ratcheting up of pressure on him. I have also previously discussed what I have viewed as Budrovich's strong and unabashed feelings about employees playing by his rules, so a coercive element manifested itself with renewed force the moment he became involved. However, Budrovich compounded the situation by *not* advising Lillicrap about reprisals or voluntariness. He compounded the situation further by telling Lillicrap that in the context of his request to sign the paper, that Lillicrap was either for or against him. Taken as a whole, the Respondent's conduct was unlawfully coercive under the *Johnnie's Poultry* standard,51 and I would find a violation of the Act.

CONCLUSIONS OF LAW

1. Budrovich Contracting Co. and Budrovich Excavating Co., the Respondent, is a single employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By its supervisor's telling employees Patrick Kammer and William Busch that their special privilege of not calling in to check on the availability of work was being revoked because the Respondent's vice president was angry over their assertion of rights under the collective-bargaining agreement, the Respondent violated Section 8(a)(1) of the Act.

4. By the Respondent's vice president's telling employees Patrick Kammer and William Busch that he was unhappy with them for asserting their rights under the collective-bargaining agreement and implying that they may lose work for asserting those rights and that they are or might be valued less than employees who do not assert or insist on those rights, the Respondent violated Section 8(a)(1) of the Act.

5. By the Respondent's supervisor and vice president's interrogating an employee in the investigation of facts concerning issues raised in the instant complaint without adhering to the Rules of the National Labor Relations Board, as set forth in *Johnnie's Poultry*, the Respondent violated Section 8(a)(1) of the Act.

6. By laying off and terminating employees Patrick Kammer and William Busch for concertedly asserting and insisting on rights guaranteed under the collective-bargaining agreement between the Respondent and the Union, and because of their support of and involvement with the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

7. By the aforesaid conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent has not violated the Act in any other way, manner, or respect.

REMEDY

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off and discharged Patrick Kammer and William Busch, I shall recommend that it be ordered to offer them reinstatement and make them whole for any loss of earnings and other benefits they may have suffered by virtue of the discrimination practiced against them, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), less any interim earnings, plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended52

ORDER

The Respondent, Budrovich Contracting Co. and Budrovich Excavating Co., a single employer, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees, including its mechanics, that any special privileges enjoyed by them, including not having to call in to check on work availability, would be revoked because the Respondent's officers or supervisors were angry about the employees' assertion of rights guaranteed them under the collective-bargaining agreement between the Respondent and Local 513, International Union of Operating Engineers, AFL–CIO.

(b) Telling employees, including its mechanics, that its vice president or other officers were unhappy with them for asserting their rights under the collective-bargaining agreement between the Respondent and Local 513, International Union of Operating Engineers, AFL–CIO, and implying that its employees may lose work for asserting those rights and that employees who assert those rights are valued less than employees who do not assert those rights.

(c) Discharging or otherwise discriminating against any employee for asserting rights guaranteed by the collective-bargaining agreement between the Respondent and Local 513, International Union of Operating Engineers, AFL–CIO.

(d) Discharging or otherwise discriminating against any employee for supporting or being involved with Local 513, International Union of Operating Engineers, AFL–CIO.

(e) Interrogating employees without complying with the Board-sanctioned rules regarding investigations of facts concerning issues raised in unfair labor practice complaints.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Patrick Kammer and William Busch full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent position without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Patrick Kammer and William Busch whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Patrick Kammer's and William Busch's unlawful discharges, and within 3 days thereafter notify

[50] The Respondent has argued that the General Counsel's failure to produce the so-called "mystery" document in evidence is fatal to the charge. I disagree, as the coercive nature of the interrogations is the gravamen of the matter, not any particular document. Also, the Respondent generated the document in question and if it exists at all, then it is probably in the possession of the Respondent and therefore was producible by it.

[51] In reaching this conclusion, I have given careful consideration to the Respondent's citing of *Midland Transportation Co., Inc. v. NLRB*, 962 F.2d 1323 (8th Cir. 1979), and *A & Transport, v. NLRB*, 601 F.2d 311 (7th Cir. 1979), which reflects circuit courts' interpretation of standards to be employed with regard to employer interrogation of employees. The Seventh and Eighth Circuits look to the "totality of the circumstances" and the "surrounding circumstances," respectively, using the *Johnnie's Poultry* standards as a relevant part of the inquiry. These circuits decline to follow a per se rule as dictated by the Board precedent. While I have declined to be bound by these circuit court decisions, I would note that in my view, had I followed the analytic approaches suggested by these circuits, I still would have found a violation of the Act.

[52] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached notice marked "Appendix."[53] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 21, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees engaged in lawful protected activity.

WE WILL NOT discharge (lay off) or otherwise discriminate against employees because of their known or suspected membership in and/or support for Local 513, International Union of Operating Engineers, AFL–CIO, or any other labor organization.

WE WILL NOT discharge (lay off) or otherwise discriminate against employees because they assert rights guaranteed by the collective-bargaining agreement between us and Local 513, International Union of Operating Engineers, AFL–CIO, or any other labor organization.

WE WILL NOT tell employees that special privileges enjoyed by them by virtue of their employment with us will be revoked because our officers or supervisors were angry about the employees' assertion of rights guaranteed them under the collective-bargaining agreement between us and Local 513, International Union of Operating Engineers, AFL–CIO, or any other labor organization.

WE WILL NOT tell employees that our vice president, or other officers and supervisors, were unhappy with them for asserting their rights under the collective-bargaining agreement between us and Local 513, International Union of Operating Engineers, AFL–CIO.

WE WILL NOT tell or imply to employees that they may lose work for asserting rights guaranteed by the collective-bargaining agreement or that employees who assert those rights are or might be valued less than employees who do not assert those rights.

WE WILL NOT interrogate employees in our investigation of facts concerning issues raised in unfair labor practice complaints filed against us without advising the employees:

1. The purpose of the questioning.
2. That no reprisals or retaliation will be undertaken.
3. That participation in the questioning is voluntary.
4. That the atmosphere of the questioning must be free of hostility to the Union or protected concerted activity.
5. That the questioning will not be coercive or threatening.
6. That the questioning will be relevant to the issues involved in the complaints(s).
7. That the employee will not be questioned about his/her state of mind regarding issues raised in the complaint.
8. That the questioning will not otherwise interfere with their statutory right.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Patrick Kammer and William Busch full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Patrick Kammer and William Busch whole for any loss of earnings and other benefits resulting from their discharge, because of known or suspected membership in and/or support for Local 513, International Union of Operating Engineers, AFL–CIO, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to Patrick Kammer's and William Busch's unlawful discharges, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

BUDROVICH CONTRACTING CO. AND BUDROVICH EXCAVATION CO.

[53] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."